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IN THE

Supreme Court of the United States

KATHLEEN HAWK SAWYER,
MICHAEL COOKSEY, AND DAVID RARDIN,
Cross-Petitioners,

v.

JAVAID IQBAL,
Cross-Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF OF CROSS-PETITIONERS

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ARGUMENT

I. THE CROSS-PETITION WAS TIMELY FILED

In satisfaction of Supreme Court Rule 12.5, cross-petitioners filed their conditional cross-petition on March 7, 2008, within 30 days of the filing of the petition for a writ of certiorari by Petitioners John Ashcroft and Robert Mueller. *See Ashcroft v. Iqbal*, No. 07-1015. Respondent Javaid Iqbal argues, however, that the cross-petition is untimely because cross-petitioners support the position of Petitioners Ashcroft and Mueller, and they are thus not

"respondents" within the meaning of Supreme Court Rule 12.6. Respondent's Brief in Opposition ("Opp. Br.") 2, 7-12.[1]

In fact, the issues and arguments raised in Ashcroft and Mueller's petition are fundamentally different than those raised in the cross-petition. Ashcroft and Mueller argue that certiorari is warranted to consider what allegations are necessary to vitiate the qualified immunity of high-ranking government officials, noting that the Second Circuit relied on conclusory allegations in denying their motion to dismiss, reached a result inconsistent with this Court's prior decisions regarding the sufficiency of pleadings, and created a conflict with other courts of appeals. No. 07-1015, Petition 11-24. They further argue that certiorari is warranted to consider whether high-ranking government officials may be held liable in an action brought pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), based on a constructive-notice theory. *Id.* at 25-33. By contrast, cross-petitioners argue that the Second Circuit's decision departs from this Court's jurisprudence construing and applying 42 U.S.C. § 1985(3). Cross-Petition 11-24.

The arguments by Ashcroft and Mueller are distinct from those raised by cross-petitioners because their petition does not and cannot raise the issues

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[1] Supreme Court Rule 12.6 states that "[a]ll parties other than the petitioner are considered respondents, but any respondent who supports the position of a petitioner shall meet the petitioner's time schedule for filing documents." Sup. Ct. R. 12.6.

unique to cross-petitioners. The only claims remaining against cross-petitioners are Section 1985(3) claims; the other claims asserted against cross-petitioners -- including procedural-due-process claim and religious- and racial- discrimination claims-- have been dismissed by the courts below. Cross-petitioners' argument that dismissal of those claims mandates dismissal of the Section 1985(3) claims (and that the Second Circuit's failure to dismiss on this ground is a departure from Supreme Court jurisprudence) is one that cannot be advanced by Ashcroft and Mueller, who still face substantive claims pled directly under the Constitution. Indeed, 42 U.S.C. § 1985(3) is mentioned but once in their petition, and that was simply as part of their summary of respondent's claims. *See* Petition at 2. Accordingly, the fact that the conditional cross-petition also references issues addressed by petitioners, *see* Opp. Br. 10, hardly renders it supportive of the petition within the meaning of Rule 12.6. The focus of the cross-petition is, plainly and simply, an issue not even mentioned, let alone addressed, in the petition. The only common point of the two petitions is that they seek reversal of the Second Circuit's decision, but that is not enough to subject the conditional cross-petition to the strictures of Supreme Court Rule 12.6. Unsurprisingly, respondent cites no authority to the contrary.

Respondent's citations to district court proceedings that preceded the filing of the cross-petition hardly advance his position. *See* Opp. Br. 10-11. The only significance of those proceedings is that the magistrate judge rejected respondent's argument, which is repeated here, that the cross-petition was filed to avoid discovery. Accordingly, upon considering the circumstances that led to the filing of the

cross-petition, *see* Dist. Ct. Docket No. 532, the magistrate judge denied respondent's request to lift the discovery stay with respect to cross-petitioners. *See* Dist. Ct. Docket Entry dated March 26, 2008.

The cross-petition was, therefore, timely filed in accordance with Rule 12.6 and should be considered by the Court.

II. THE SECOND CIRCUIT'S DECISION IS INCONSISTENT WITH PRIOR SECTION 1985(3) JURISPRUDENCE

Respondent has distorted the legal and factual contours of cross-petitioners' arguments. The Second Circuit's decision left only the sixteenth and seventeenth causes of action remaining against cross-petitioners. These causes of action asserted claims under 42 U.S.C. § 1985(3) that cross-petitioners, based on animus grounded in religion and race or national origin, conspired to subject respondent to unnecessarily harsh conditions in the Administrative Maximum ("ADMAX") Special Housing Unit ("SHU") *without due process*. As demonstrated in the cross-petition, because respondent asserted an independent procedural-due-process claim on the same grounds in his second cause of action, and because the Second Circuit dismissed that cause of action on grounds of qualified immunity, there is no legal basis on which the Section 1985(3) claims could survive.

Respondent replies by insisting that his Section 1985(3) claims are not predicated on the same procedural-due-process right underlying his second cause of action. Opp. Br. 14-17. This claim, however, defies both logic and the plain language of

respondent's own amended complaint. The sixteenth cause of action states, in relevant part:

> Defendants...agreed to deprive Plaintiffs of the equal protection of the laws of the United States because of Plaintiffs' sincere religious belief ...in violation of 42 U.S.C. § 1985(3): Defendants['] ...agreement to subject Plaintiffs to unnecessarily harsh conditions of confinement in ADMAX SHU *without due process*[.]

App.206a (emphasis added). The seventeenth cause of action makes the identical allegation, but asserts that the illegal animus was based on respondent's "race and/or national origin." App. 208a. The first clause of each cause of action merely repeats the language of Section 1985(3) and is, by itself, conclusory. 42 U.S.C. § 1985(3). It is the language that follows, however, that is operative. It explains why a violation of § 1985(3) allegedly occurred by identifying both the object of the conspiracy and the independent right violated: the placement of respondent in the SHU without procedural due process. Notably, Respondent's second cause of action -- labeled "Assignment to ADMAX SHU-Fifth Amendment Due Process" -- alleged that by implementing the policy under which respondent was "confined to solitary confinement in the ADMAX SHU in an arbitrary and unreasonable matter, without any defined criteria, contemporaneous review, or process of any sort ...Defendants ...deprived [respondent] of liberty without due process of law ...." App. 193a-194a.

Contrary to respondent's assertion, Opp. Br. 14-15, the district court fully understood that the Section 1985(3) claims were predicated on procedural due process under the Fifth Amendment. In summariz-

ing the claims, the district court pinpointed the operative sentence of the two causes of action asserted under Section 1985(3): cross-petitioners allegedly had "agreed to subject [respondent] to unnecessarily harsh conditions of confinement without due process[.]" App. 142a. Respondent fails to explain why the assertions regarding confinement and due process in the Section 1985(3) causes of action involve a right different than the one identified in the second cause of action, or why he asserted in his Section 1985(3) causes of action that he had been denied due process if he did not intend to allege that there had been due-process violations.

In addition, respondent's argument misconstrues Section 1985(3) jurisprudence. To state a cause of action under the statute, a plaintiff must allege that a defendant "conspire[d] ...for the purpose of depriving ...a person ...of the equal protection of the laws, or of equal privileges and immunities of the laws" based on "some racial, or ...otherwise class-based, invidiously discriminatory animus." 42 U.S.C. § 1985(3); *see also Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971). Section 1985(3) "provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates." *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 372 (1979). Thus, the litigants must plead and prove a "predicate" constitutional right. *See Volunteer Medical Clinic, Inc. v. Operation Rescue*, 948 F.2d 218, 226 & n.2 (6th Cir. 1991); *Emanuel v. Barry*, 724 F. Supp. 1096, 1100 (E.D.N.Y. 1989) ("In other words, there must be some sort of predicate constitutional right which the alleged conspirators conspired to violate.").

In essence, therefore, a Section 1985(3) claim must allege that a person, due to some class-based animus, has conspired to deprive someone of an independent or predicate constitutional right. In *Griffin*, for example, which involved a violent attack of black men because of their race, the Court recognized that the Section 1985(3) claim was predicated on two rights: the Thirteenth Amendment's prohibition of slavery and the right of interstate travel. *See Griffin* 403 U.S. at 105-06. In *United Bhd. of Carpenters v. Scott*, 463 U.S. 825 (1983), this Court held: "The rights, privileges, and immunities that § 1985(3) vindicates must be found elsewhere, and here the right claimed to have been infringed has its source in the First Amendment." *Id.* at 833. In the present case, respondent's theory is that cross-petitioners, on the basis of animus rooted in religion and race or national origin, conspired to deprive respondent of his Fifth Amendment right to procedural due process when they placed him in the SHU.

Contrary to respondent's argument, cross-petitioners have not waived this argument because this issue first arose when the Second Circuit dismissed the independent procedural-due-process claim on the basis of qualified immunity but failed also to dismiss the Section 1985(3) allegations predicated on that same due-process right. Cross-petitioners' argument is not and has never been that respondent failed to assert an "independent right" for purposes of satisfying the elements of Section 1985(3). Indeed, the amended complaint demonstrates that the predicate right asserted by respondent is procedural due process. Rather, cross-petitioners' argument is that because respondent's Section 1985(3) claims must each be predicated on an independent right, and because that same independent right was asserted in

a separate cause of action that was dismissed on grounds of qualified immunity, the Section 1985(3) claims likewise are no longer viable.

Respondent also attempts to de-emphasize the "independent right" language referenced in Section 1985(3) jurisprudence by claiming that it is limited to cases in which there are only private, as opposed to governmental, actors. Opp. Br. 17-18. It is settled that Section 1985(3) cannot apply to private conspiracies unless the independent right sought to be vindicated prohibits private encroachment. *See Scott*, 463 U.S. at 830-33. In other words, "[w]hen no state action is involved, only those constitutional rights that exist against private actors may be challenged under the section." *Hobson v. Wilson*, 737 F.2d 1, 15 (1984). This does not mean, however, that an independent right need not be raised at all if the Section 1985(3) claim is asserted against a governmental actor. Rather, it simply means that, in such cases, the right asserted must be one that is protected from governmental infringement. *Id.* ("When state action is involved, *the whole spectrum of rights against state encroachment that the Constitution sets forth* come into play [under § 1985(3)].") (emphasis added). Notably, respondent fails to explain how this accepted distinction between private and governmental actors in Section 1985(3) jurisprudence has any bearing on the fact that his 1985(3) claims do not survive where the predicate rights that he seeks to vindicate are identical to the rights raised in claims already dismissed on the basis of qualified immunity. In any event, this tenet has been applied to cases involving governmental actors. *See Denney v. City of Albany*, 247 F.3d 1172, 1190 (11th Cir. 2002) ("Having concluded that Plaintiffs' substantive claims fail on the merits, their [Section 1985(3)] conspiracy

claim fails as well because Plaintiffs would not have been 'deprived of any rights or privilege' by the Defendants' allegedly wrongful acts."); *see also Indianapolis Minority Contractors Ass'n, Inc. v. Wiley*, 187 F.3d 743 (7th Cir. 1999).

Notwithstanding the clear language of the amended complaint identifying procedural due process as the predicate independent right underlying his Section 1985(3) claims, respondent highlights the phrase "equal protection of law" in Section 1985(3) to argue that such an allegation advances a claim under the Equal Protection Clause. Opp. Br. 15-19. In meeting his obligation to identify an independent, substantive right as part of his Section 1985(3) allegations, Respondent cannot simply point to the introductory language of that statute and assert that he has pled an equal protection claim within the meaning of the Fifth Amendment. Based on the legislative history and historical context, there is no doubt that the Reconstruction Congress in the aftermath of the Civil War placed the phrase "equal protection of the laws" into Section 1985(3) in order to address class-based discrimination. *See Griffin*, 403 U.S. at 98-102. And it is clear that the Equal Protection Clause of the Fourteenth Amendment aims to combat class-based discrimination as well. Nonetheless, this Court has stated that, despite the similarity, the language of Section 1985(3) prohibiting the deprivation "of the equal protection of the laws, or of equal privileges and immunities of the laws" is not the same as the Equal Protection Clause itself. *See Scott*, 463 U.S. at 832; *Griffin*, 403 U.S. at 96-97. Rather, "equal protection" identifies "class-based [] invidiously discriminatory animus." *Griffin*, 403 U.S. at 102; *Emanuel*, 724 F. Supp. at 1102 ("[T]he Court has consistently emphasized that the statute does not

create substantive rights, thus precluding, as a matter of law, such a broad interpretation of "equal protection."). Thus, despite its requirement that there be class-based animus, Section 1985(3) does not create an independent Equal Protection Clause right that can be vindicated, and Respondent cannot seize upon the equal protection phraseology of the statute itself in an attempt to augment the substantive rights he seeks to vindicate. If Respondent had wanted to plead a substantive equal protection violation in his Section 1985(3) counts, he could have done so in the course of drafting his multiple amended complaints. But he did not.

Respondent's premise that his Section 1985(3) causes of action raise Equal Protection Clause claims rather than due-process claims is nonsensical. If all Section 1985(3) claims were assumed to invoke the Equal Protection Clause, litigants alleging private conspiracies would never be able to assert such claims since, as repeatedly noted in this Court's Section 1985(3) jurisprudence, the Equal Protection Clause prohibits only governmental encroachment. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 268 (1993); *Scott*, 463 U.S. at 831-33; *Griffin*, 403 U.S. at 97-102. Accordingly, although respondent has sued governmental actors, his premise is unworkable as a legal theory of general applicability.

Even if the Section 1985(3) claims could each be construed as incorporating an Equal Protection claim, they still would not survive because the district court dismissed the independent religious and racial discrimination claims asserted in the

eleventh and twelfth causes of action as to cross-petitioners for lack of personal involvement, and thus on the basis of qualified immunity. App. 133a-137a; *see, e.g., Johnson v. Harron*, No. 91 Civ. 1460, 1995 U.S. Dist. LEXIS 7328, at *99 (N.D.N.Y. May 23, 1995). Accordingly, whether respondent's Section 1985(3) claims are predicated on equal protection or procedural due process, or both, the lower courts in this case have dismissed all causes of action independently raising those same claims.

The fact that the Second Circuit appeared to construe respondent's Section 1985(3) claims as raising Equal Protection claims, *see* App. 65a, effectively illustrates the fact that it deviated from this Court's jurisprudence. The Second Circuit failed to recognize that Section 1985(3) is not coextensive with the Fourteenth Amendment's Equal Protection Clause. *See Scott*, 463 U.S. at 832; *Griffin*, 403 U.S. at 96-97. In fact, without discussion, the Second Circuit simply assumed that an Equal Protection Clause claim was asserted in each Section 1985(3) cause of action. But regardless of which independent right was involved, the Second Circuit's ultimate failure to dismiss the Section 1985(3) claims is yet another departure from this Court's precedent. This case is worthy of certiorari because it offers this Court an ideal opportunity, not to correct a mere error as asserted by respondent, Opp. Br. 12, 14, 21, but to prevent a significant departure from its precedent and to clarify this important area of law.

Respondent's final points regarding the adequacy of the pleadings misconstrue the record. Cross-petitioners have not waived any argument regarding the sufficiency of the pleadings, *see* Opp. Br. 20, because they unquestionably have made that

argument throughout the proceedings below. The "plausibility standard" itself only became an issue after the Second Circuit rendered its decision.

Respondent's efforts to illustrate the adequacy of the allegations in the amended complaint are in vain. Opp. Br. 20. Although respondent alleges that cross-petitioners Sawyer and Cooksey were responsible for his assignment to the ADMAX SHU and oversaw the process by which September 11 detainees were placed into administrative segregation and released, Opp. Br. 20, he fails to allege with specificity how cross-petitioners allegedly took these actions as part of a conspiracy or on the basis of religion, race, or national origin. Indeed, respondent's point that "cross-petitioners knew of and agreed to establish this policy whereby detainees like respondent were confined in the ADMAX SHU for arbitrary reasons and solely because of race, religion, and national origin," Opp. Br. 20, is wholly conclusory. He thus fails to satisfy the "plausibility standard" enunciated in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007).

Demonstrative of this inadequacy is the district court's resolution of the separate causes of action that implicated the same rights invoked in the Section 1985(3) claims. With respect to the religious and racial discrimination claims (the eleventh and twelfth causes of action), which asserted that respondent's rights were violated when he was placed in the ADMAX SHU on the basis of his religion and race, the district court dismissed those claims on grounds of qualified immunity, holding that respondent had *failed to sufficiently allege cross-petitioners' personal involvement*. App. 136-137a. Consequently, if respondent's pleadings were insufficient to allege

cross-petitioners' personal involvement in the assignment to the ADMAX SHU on the basis of religion and race or national origin, respondent's pleadings are necessarily insufficient to allege cross-petitioners' conspiracy to do the same on the basis of religion and race or national origin. App. 145a. Accordingly, respondent's Section 1985(3) claims cannot stand.

CONCLUSION

The cross-petition should be granted for the foregoing reasons and for the reasons stated in the conditional cross-petition for a writ of certiorari.

Respectfully submitted,

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